Supreme Court, U.S.
FILED

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Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

MARJORIE A. MEESTER,

Petitioner,

VS

MARVIN T. RUNYON, POSTMASTER GENERAL,
U.S. POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the majority of the Eighth Circuit panel below erred in concluding that a Federal Employee's Compensation Act claimant who has received benefits under the Federal Employee's Compensation Act cannot maintain a failure to accommodate claim under the Rehabilitation Act.

2. Whether the majority of the Eighth Circuit panel below erred in concluding that Petitioner's Motion to Amend her Complaint to seek exemplary damages was without merit.

LIST OF PARTIES

All parties to this Petition are listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS AND REGULATIONS 2

1. 5 U.S.C. § 8101(5) 2

2. 29 U.S.C. § 791(b) 2

3. 29 U.S.C. § 794a(a)(1) 2

4. 42 U.S.C. § 1981a(a)(2) 2

5. 42 U.S.C. § 1981a(a)(3) 2

6. 42 U.S.C. § 1981a(b)(1) 2

7. 42 U.S.C. § 2000e-16(a) 2

8. Fed. R. Civ. P. 15(a) 2

9. Fed. R. Civ. P. 56(c) 3

10. 29 C.F.R. § 1614.203(b) 3

11. 29 C.F.R. § 1614.203(c)(1) 3

STATEMENT OF THE CASE 3

ARGUMENT IN SUPPORT OF GRANTING THE WRIT 6

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES:

Ausfeldt v. Runyon, 950 F. Supp. 478 (N.D.N.Y. 1997) 10

Baker v. Runyon, 922 F. Supp. 1296 (N.D. Ill. 1996);
rev'd by 114 F.3d 668 (7th Cir. 1997) 4, 9, 10

Callanan v. Runyun, 903 F. Supp. 1285 (D. Minn. 1994)
aff'd 75 F.3d 1293 (8th Cir. 1996) 7

Eckley v. Bentsen, 1994 WL 114646 (D.D.C. 1994) 7

George v. Frank, 761 F. Supp. 256 (S.D.N.Y. 1991) 7

Gergick v. Austin, 764 F. Supp. 580 (W.D. Mo. 1991) 7

Johnson v. Sullivan, 764 F. Supp. 1053 (D. Md. 1991) 7

Loeffler v. Frank, 486 U.S. 549 (1988) 9, 10

Miller v. Bolger, 802 F.2d 660 (3d Cir. 1986) 7, 8

Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994) 7

Nichols v. Frank, 771 F. Supp. 1075 (D. Or. 1991) 7

Reidy v. Runyon, 971 F. Supp. 760 (E.D.N.Y. 1997) 7

Sullivan v. United States, 428 F. Supp. 79 (E.D. Wis. 1977) ... 7

Taylor v. Secretary of Navy, 852 F. Supp. 343 (E.D. Pa. 1994); aff'd Taylor v. Dalton, 61 F.3d 896 (3d Cir. 1995) 8

FEDERAL STATUTES:

5 U.S.C. § 8101(5) 2

28 U.S.C. § 1254 2

28 U.S.C. § 1331 4

29 U.S.C. § 791 ..... 2, 3, 4, 8

29 U.S.C. § 794a(a)(1) 2

42 U.S.C. § 1981a(a)(2) 2, 8

42 U.S.C. § 1981a(a)(3) 2

42 U.S.C. § 1981a(b)(1) 2

42 U.S.C. § 2000e-5 8

42 U.S.C. § 2000e-16 ..... 2, 8

FEDERAL RULES AND REGULATIONS:

Fed. R. Civ. P. 15(a) 2

Fed. R. Civ. P. 56(c) 3

Sup. Ct. R. 10(a) 6

Sup. Ct. R. 10(c) 6

Sup. Ct. R. 13.3 2

29 C.F.R. § 1614.203(b) 3

29 C.F.R. § 1614.203(c)(1) 3

SECONDARY AUTHORITIES:

1949 U.S.C.C.A.N. 2136, 2143 8

OPINIONS BELOW

The Eighth Circuit's Order denying the Petition for Re-Hearing and Suggestion for Re-Hearing En Banc is unreported and set forth in Petitioner's Appendix. (App. 1.) The July 16, 1998 Eighth Circuit Opinion affirming the decision of the lower court is reported at 149 F.3rd 855 (8th Cir. 1998) and is set forth in Petitioner's Appendix. (App. 2-19.) The December 31, 1996 Memorandum and Order of the United States District Court for the District of North Dakota denying judgment as a matter of law and the motion for a new trial is unreported and set forth in Appendix at pages 20-22. The October 7, 1996 Judgment in a Civil Case by Jury Verdict is unreported and set forth at page 23 of Petitioner's Appendix.

The September 18, 1995 Memorandum and Order of the United States District Court for the District of North Dakota denying the United States Postal Service's Motion for Summary Judgment is unreported and set forth at pages 24-35 of Petitioner's Appendix. The May 17, 1996 Memorandum and Order of the United States District Court for the District of North Dakota vacating its denial of the United States Postal Service's Motion for Summary Judgment and dismissing Ms. Meester's failure to accommodate claim is unreported and set forth at pages 36-41 of Petitioner's Appendix. The May 17, 1996 Memorandum and Order of the United States District Court for the District of North Dakota staying the proceedings for an interlocutory appeal is unreported and set forth at pages 42-43 of Petitioner's Appendix. The June 10, 1996 Judgment of the United States Court of Appeals for the Eighth Circuit denying the Cross-petitions for permission to bring an interlocutory appeal is unreported and set forth at pages 44-45 of Petitioner's Appendix.

JURISDICTION

On July 16, 1998, the United States Court of Appeals for the Eighth Circuit entered its decision by a divided vote affirming the decision of the United States District Court for the District of North Dakota. (App. 2-19.) On September 29, 1998, the United States Court of Appeals for the Eighth Circuit entered its Order denying Ms. Meester's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 1.) This Petition was filed within 90 days after entry of the Order denying Ms. Meester's Petition for Rehearing and Suggestion for Rehearing En Banc. As a result, this Petition is timely pursuant to Rule 13.3 of the Rules of the Supreme Court of the United States. The statutory provision conferring jurisdiction to the Supreme Court of the United States to review Petitioner's Writ of Certiorari is 28 U.S.C. § 1254.

STATUTORY PROVISIONS AND REGULATIONS

1. 5 U.S.C. § 8101(5) (App. 46.)

2. 29 U.S.C. § 791(b) (App. 47.)

3. 29 U.S.C. § 794a(a)(1) (App. 48.)

4. 42 U.S.C. § 1981a(a)(2) (App. 49.)

5. 42 U.S.C. § 1981a(a)(3) (App. 50.)

6. 42 U.S.C. § 1981a(b)(1) (App. 51.)

7. 42 U.S.C. § 2000e-16(a) (App. 52.)

8. Fed. R. Civ. P. 15(a) (App. 53.)

9. Fed. R. Civ. P. 56(c) (App. 54.)

10. 29 C.F.R. § 1614.203(b) (App. 55.)

11. 29 C.F.R. § 1614.203(c)(1) (App. 56.)

STATEMENT OF THE CASE

A. Procedural Background

Petitioner, Marjorie A. Meester, commenced this action on April 13, 1994, by filing a complaint with the United States District Court for the District of North Dakota. Ms. Meester alleged disability discrimination in violation of the Rehabilitation Act, 29 U.S.C. § 791 et seq. Ms. Meester claimed that the United States Postal Service, Respondent, failed to provide her with proper rest breaks according to her physician's recommendations, and further, that the United States Postal Service failed to provide her with two consecutive days off for rest as recommended by her attending physician.

On April 26, 1995, the United States Postal Service moved to dismiss Ms. Meester's complaint, or in the alternative for summary judgment. Magistrate Karen Klein for the United States District Court for the District of North Dakota denied the United States Postal Service's Motion for Summary Judgment by Memorandum and Order filed on September 18, 1995. (App. 24-35.) The United States Postal Service moved for reconsideration of the Memorandum and Order denying its Motion for Summary Judgment. On May 17, 1996, the lower court reversed its original September 18, 1995 Memorandum and Order and held that Ms. Meester's recovery of Federal Employees Compensation Act (hereinafter "FECA") benefits precluded her failure to accommodate claims brought pursuant to the Rehabilitation Act, 29 U.S.C. § 791

et seq. (App. 36-41.) As a result, the parties stipulated to and the lower court granted a stay of the proceedings in order for the parties to pursue interlocutory appeals. On June 10, 1996, the United States Court of Appeals for the Eighth Circuit denied the Cross-Petitions for permission to bring an interlocutory appeal. (App. 44-45.)

On August 23, 1996, Ms. Meester moved to amend her complaint to include a claim for exemplary damages based upon the then recent holding in Baker v. Runyon, 922 F.Supp. 1296 (N.D. Ill. 1996), and for clarification purposes. On September 13, 1996, the lower court denied Ms. Meester's Motion to amend her complaint to seek exemplary damages.

On September 30, 1996, a jury trial was commenced and resulted in a jury verdict in favor of the United States Postal Service. (App. 23.) On October 11, 1996, Ms. Meester moved for judgment as a matter of law, or alternatively, for a new trial. On December 31, 1996, the lower court denied Ms. Meester's Motion for judgment as a matter of law, or alternatively, for a new trial. (App. 20-22.)

On January 30, 1997, Ms. Meester filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. On July 16, 1998, the United States Court of Appeals for the Eighth Circuit affirmed the lower court. (App. 2-19.) Subsequently, Ms. Meester requested a rehearing, and on September 29, 1998, the United States Court of Appeals for the Eighth Circuit denied Ms. Meester's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 1.)

The United States District Court for the District of North Dakota, Southeastern Division, had original jurisdiction pursuant to 28 U.S.C. § 1331 as this action involved a federal question. Ms. Meester is now petitioning for a Writ of Certiorari to the Supreme Court of the United States.

B. Facts

In 1978, Ms. Meester began working for the United States Postal Service as a clerk in Cooperstown, North Dakota. In 1984, Ms. Meester transferred to the West Fargo Post Office, and then in 1988, Ms. Meester transferred to the newly opened Prairiewood Station of the Fargo Post Office. Throughout her transfers, Ms. Meester remained classified as a clerk at the United States Postal Service.

In July of 1988, while working for the United States Postal Service, Ms. Meester suffered a work-related injury and was diagnosed with chronic tendinitis of the elbows. In January of 1989, Ms. Meester suffered a reinjury while at work, and in June of 1989, Ms. Meester was diagnosed with carpel tunnel syndrome in both of her wrists which required two surgeries; one for each wrist. As a result of these work-related injuries, Ms. Meester has been diagnosed and deemed to have a 25% partial permanent impairment of her upper extremities.

While Ms. Meester was recuperating and performing rehabilitation, the United States Postal Service demanded that she return to work immediately. As a result, Ms. Meester and her attending physician, Dr. Gregory Orson, arranged for an occupational therapist to accompany Ms. Meester to the work site to perform an evaluation of work duties to determine what work duties were within Ms. Meester's physical limitations. On March 4, 1991, Ms. Meester, accompanied by an occupational therapist, returned to work for an on-site evaluation. The Prairiewood Station Manager forced Ms. Meester to sign and accept the United States Postal Service's job offer or else he would not allow the occupational therapist to perform an on-site evaluation. Pursuant to the duress, Ms. Meester accepted the United States Postal Service's job offer that failed to provide for scheduled rest breaks and two consecutive days off per work week as recommended by her attending physician. Ms. Meester signed the

job offer so that the occupational therapist would be allowed to perform an on-site evaluation. Subsequent to March 4, 1991, Ms. Meester and her attending physician consistently made accommodation requests of scheduled rest breaks and two consecutive days off of work per week for rest. The United States Postal Service refused these requests, and as a result, Ms. Meester initiated an EEO complaint, exhausted her administrative remedies, and filed a complaint against the United States Postal Service in the United States District Court for the District of North Dakota.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Pursuant to Rule 10(a) and (c) of the Rules of the Supreme Court of the United States, Ms. Meester requests that this court grant her Writ of Certiorari. Rule 10(a) of the Rules of the Supreme Court of the United States provides that a reason for granting a writ can be based upon the fact that "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter". Further, Rule 10(c) of the Rules of the Supreme Court of the United States provides that a reason for granting a writ can be based upon the fact that "a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court."

A. Conflicting Decisions - Rule 10(a)

With regard to Ms. Meester's first issue that of whether her receipt of FECA benefits bars her subsequent failure to accommodate claim brought pursuant to the Rehabilitation Act, the decision of the United States Court of Appeals for the Eighth

Circuit's in this case is inconsistent with various United States Court of Appeals and United States District Courts. For example, in Callanan v. Runyun, 903 F. Supp. 1285 (D. Minn. 1994), aff'd 75 F.3d 1293 (8th Cir. 1996), the court concluded that FECA does not include recovery under Title VII specifically, and generally, is equally applicable to other anti-discrimination statutes such as the Rehabilitation Act. In reaching its conclusion, the court cited several federal decisions for support. Id. at 1296; see, e.g. Miller v. Bolger, 802 F.2d 660, 663-64 (3d Cir. 1986) (stating the FECA was intended only to be a substitute for suits against the United States for tortious injury and not intended to preclude actions for discrimination subsequent to a FECA recovery); Eckley v. Bentsen, 1994 WL 114646 at *7 (D.D.C. 1994) (stating that FECA and Title VII create separate remedies for distinct types of injuries); Nichols v. Frank, 771 F. Supp. 1075, 1079 (D. Or. 1991) (finding that FECA does not bar recovery under Title VII when there is no double recovery); Gergick v. Austin, 764 F.Supp. 580, 581 (W.D. Mo. 1991) (finding that FECA is exclusive remedy for work-related personal injuries only and is not a bar to recovery for injuries due to discrimination); Johnson v. Sullivan, 764 F. Supp. 1053, 1063 (D. Md. 1991) (stating that Title VII and Rehabilitation Act claims are not barred by receipt of FECA benefits); George v. Frank, 761 F. Supp. 256, 259 (S.D.N.Y. 1991) (finding that FECA coverage, which is most commonly associated with work-related injuries, clearly fails to preclude a request to pursue discrimination claims under the umbrella of equitable remedies available under Title VII); Sullivan v. United States, 428 F. Supp. 79, 81 (E.D. Wis. 1977) (stating that injuries compensable under FECA include injuries by accident and disease, not claims for discrimination); see also Nichols v. Frank, 42 F.3d 503, 515 (9th Cir. 1994) (stating that the exclusivity provisions of FECA apply only to additional payments for work-related injuries); Reidy v. Runyon, 971 F. Supp. 760, 769-71 (E.D.N.Y. 1997) (finding that receipt of FECA benefits does not preclude

recovery under Rehabilitation Act because the statutes are not mutually exclusive); Taylor v. Secretary of Navy, 852 F. Supp. 343, 351-53 (E.D. Pa. 1994) (stating FECA benefits do not preclude recovery under the Rehabilitation Act), aff'd Taylor v. Dalton, 61 F.3d 896 (3d Cir. 1995) (unpublished table decision).

The decision by the Court of Appeals for the Eighth Circuit in this case fails to account for the fact that the FECA and the Rehabilitation Act provide distinctly different forms of relief. The FECA only allows employees to recover lost wages and medical costs incurred as a result of injuries which are sustained in the performance of their duties. Miller v. Bolger, 802 F.2d at 662. In contrast, the relief available under the Rehabilitation Act includes the equitable remedies as back pay, front pay, attorney's fees, injunctive relief, compensatory damages, punitive damages, and reinstatement. See 42 U.S.C. §§ 2000e-16(a)-(e); 2000e-5(f)-5(k); and 1981a(a)(2). Given the dissimilarities of the relief available under the two statutes, it is evident that the FECA is ill-equipped to provide make whole relief to employees who suffer from discrimination.

Further, a review of the legislative history contained in 1949 U.S.C.C.A.N. 2136, 2143 indicates that the FECA was intended to compensate employees who suffer work-related injuries and immunize employers from tort actions for the same injuries. It appears that FECA's exclusivity provision must be read as foreclosing an employee who elects to receive FECA benefits from also bringing a tort action against the employer under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, etc.

Lastly, it is not enough to say that the Postal Service complied with its FECA obligations and can now feel free to discriminate against Ms. Meester. It is important to note that the FECA obligations are a bare minimum standard. Whereas, the Rehabilitation Act requires an affirmative duty on behalf of the United States Postal Service in accommodating its employees who are individuals with handicaps. 29 U.S.C. § 791. Quite frankly, the

United States Postal Service's compliance with the bare minimum standard of the FECA has no bearing on the question of whether the United States Postal Service must reasonably accommodate Ms. Meester's disability. As stated by the Honorable Circuit Judge Heaney, in his dissent in the United States Court of Appeals for the Eighth Circuit's decision in this case, "the majority eviscerates the Rehabilitation Act by denying its protection to disabled employees–clearly the intended beneficiaries of the Act. In attempting to clarify the boundaries of two statutes dealing with reasonable accommodation, the majority exalts FECA, clearly a tort surrogate, to supplant the broad remedial purposes of the Rehabilitation Act. The mischief done today can only be undone by Congress, our court en banc, or the United States Supreme Court." (App. 18-19.)

B. Important Federal Question - Rule 10(c)

With regard to Ms. Meester's second issue of whether she should have been allowed to seek exemplary damages against the United States Postal Service, the majority of the United States Court of Appeals for the Eighth Circuit stated, "that it carefully reviewed the argument and found it to be without merit". (App. 7-8.) Lacking, however, from the decision is a discussion of the decision for Baker v. Runyon, 922 F. Supp. 1296 (N.D. Ill. 1996), which has since been overturned by the Seventh Circuit in Baker v. Runyon, 114 F.3d 668 (1997).

The United States District Court for the Northern District of Illinois in the Baker case, correctly found that the United States Postal Service is subject to a "sue-and-be-sued" clause, in that Congress intended that the United States Postal Service be run more like a business than its predecessor, the Post Office Department. 922 F. Supp. at 1297-1298 (citing to Loeffler v. Frank, 486 U.S. 549, 556 (1988)). Congress saw to it that the United States Postal Service cast

off its cloak of sovereignty and assume the status of a commercial enterprise. Id. at 1298 (citing to Loeffler at 565). As a result, punitive damages were allowed against the United States Postal Service as they were allowed against any private commercial enterpise. Id. The United States District Court for the Northern District of New York has also agreed that punitive damages are allowed against the United States Postal Service in Ausfeldt v. Runyon, 950 F. Supp. 478, 487 (N.D.N.Y. 1997).

Because of the clear conflict of lower court decisions on both issues, a decision by this Court is needed to resolve the conflict. Further, both issues involve important federal questions that need clarification to provide full and complete remedies to injured federal workers. A decision by this Court will provide a final resolution to issues that are split in the United States District Courts throughout the United States of America and the United States Courts of Appeals and carry out the clear intent of Congress in providing remedies for injured federal workers..

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: December 21, 1998

INDEX TO THE APPENDIX

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the United States Court of Appeals for the Eighth Circuit, No. 97-1580 NDF, September 29, 1998 1

Decision of the United States Court of Appeals for the Eighth Circuit, Meester v. Runyon, Filed July 16, 1998, (published at 149 F.3d 855 (8th Cir. 1998)) 2-19

Memorandum and Order of the United States District Court for the District of North Dakota, Civil No. A3-94-44, December 31, 1996 20-22

Judgment in a Civil Case by Jury Verdict, Case No. A3-94-44, October 7, 1996 23

Memorandum and Order of the United States District Court for the District of North Dakota, Civil No. A3-93-80, September 18, 1995 24-35

Memorandum and Order of the United States District Court for the District of North Dakota, Civil No. A3-93-80, May 17, 1996 36-41

Memorandum and Order of the United States District Court for the District of North Dakota, Civil No. A3-93-80, May 17, 1996 42-43

Judgment of the United States Court of Appeals for the Eighth Circuit, No. 96-8075 NDF, June 10, 1996 44-45

5 U.S.C. § 8101(5) 46

29 U.S.C. § 791(b) 47

29 U.S.C. § 794a(a)(1) 48

42 U.S.C. § 1981a(a)(2) 49

42 U.S.C. § 1981a(a)(3) 50

42 U.S.C. § 1981a(b)(1) 51

42 U.S.C. § 2000e-16(a) 52

Fed. R. Civ. P. 15(a) 53

Fed. R. Civ. P. 56(c) 54

29 C.F.R. § 1614.203(b) 55

29 C.F.R. § 1614.203(c)(1) 56

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 97-1580NDF

Marjorie A. Meester,	*	
	*	Order Denying Petition
Appellant,	*	For Rehearing and
	*	Suggestion for
v.	*	Rehearing En Banc
	*	
Marvin T. Runyon,	*	
Postmaster General, United	*	
States Postal Service,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing by the panel is also denied.

September 29, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1580

Marjorie A. Meester,	*
	*
Appellant,	*
	*
v.	*
	*
Marvin T. Runyon,	*
Postmaster General, United	*
States Postal Service,	*
	*
Appellee.	*

Submitted: March 12, 1998
Filed: July 16, 1998

Before BEAM and HEANEY, Circuit Judges, and KOPF[1], District Judge.

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

BEAM, Circuit Judge.

After an adverse jury verdict on her Rehabilitation Act claim, Marjorie A. Meester appeals, claiming the district court[2] erred in, among other things, granting her employer's motion for partial summary judgment before trial. We affirm.

I. BACKGROUND

Meester, a long-term employee of the United States Postal Service, developed work-related chronic tendinitis. This condition eventually developed into carpal tunnel syndrome, requiring surgery. Meester filed workers' compensation claims for these injuries under the Federal Employees' Compensation Act (FECA). See 5 U.S.C. §§ 8101-8193. The Department of Labor, which administers FECA, see 5 U.S.C. § 8145, awarded Meester benefits under the Act.

In addition to providing certain compensatory benefits, FECA requires federal employers to allow injured employees to return to their old positions or, if they can no longer perform their original duties, to offer them reasonable alternative positions. See 5 U.S.C. § 8151(b); 20 C.F.R. § 10.123(d).

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2 The Honorable Karen K. Klein, United States Magistrate Judge for the District of North Dakota, presiding by consent of the parties. See 28 U.S.C. § 636(c).

Meester suffered from a partial permanent impairment affecting twenty-five percent of her upper extremities, and could not perform her old job. The Postal Service therefore offered to create several different limited duty positions for Meester, all of which she rejected as beyond her limitations. Meester's doctor eventually approved one of the proposed positions which provided two non-consecutive days off per week. The doctor informed the Postal Service that it would be "helpful" if Meester could have two consecutive days off. The Postal Service responded that because Mondays and Saturdays are its busiest days, it could not grant this request. Of the more than seventy employees who work at the same post office as Meester, only five routinely have Saturday and Sunday off. After reviewing the proposed position, Meester's medical records, and her doctor's recommendations, the Department of Labor concluded that the proposed position was fully consistent with Meester's physical limitations. It therefore directed Meester to accept the position or lose her FECA benefits. Meester returned to work, but continued to maintain that the job was not sufficiently accommodating of her injuries. She asserted that the position was inappropriate because it did not provide two consecutive days off or sufficient rest time.

Meester eventually filed suit claiming that the Postal Service had violated the Rehabilitation Act, 29 U.S.C. § 794(a), by (1) treating her unfavorably because of her disabled status; (2) failing to adequately accommodate her disability; and (3) harassing and retaliating against her. The Postal Service moved for summary judgment. The district court initially denied the motion, but upon reconsideration granted summary judgment to the Postal Service on the accommodation claim. The court reasoned that because Meester had received this position as part

of her FECA claim, her only remedy as to disputes about the nature of the job was under FECA. The disparate treatment and retaliation claims proceeded to trial. After Meester had presented her case-in-chief, the district court granted the Postal Service judgment as a matter of law on the retaliation claims. The disparate treatment claim was submitted to the jury, which returned a verdict for the Postal Service. Meester appeals.

II DISCUSSION

Meester argues that the district court erred in granting the Postal Service summary judgment on her failure to accommodate claim. We review a district court's grant of summary judgment de novo. See Lang v. Star Herald, 107 F.3d 1308, 1311 (8th Cir.), cert. denied, 118 S. Court. 114 (1997). Summary judgment is proper if, taking all facts and reasonable inferences from those facts in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Id.; see also Fed. R. Civ. P. 56(c).

FECA is the exclusive remedy for workplace injuries suffered by federal employees. See 5 U.S.C. § 8116(c). Several courts have held, however, that this workers' compensation statute does not bar federal employees from suing their employers under the anti-discrimination laws. See, e.g., Miller v. Bolger, 802 F.2d 660 (3d Cir. 1986) (Title VII claim not barred by FECA); Callanan v. Runyun, 903 F. Supp. 1285, 1296 (D. Minn. 1994) (Postal Service employee not precluded by FECA from suing under Title VII), aff'd on other grounds, 75 F.3d 1293 (8th Cir. 1996). Meester asserts that the district court departed from this line of cases and held that FECA

precludes federal employees from suing under the Rehabilitation Act. Meester mischaracterizes the district court's ruling. The court did not hold that all discrimination claims are barred under FECA; indeed, it allowed her disparate treatment and retaliation claims to proceed to trial. Rather, the district court held that Meester's unique failure to accommodate claim was barred by FECA. We are convinced that this ruling was correct.[3]

Meester is not claiming that she could perform her old job with reasonable accommodation. Instead, she seeks accommodations in performing the alternative position she was awarded under FECA. The Department of Labor is charged with determining whether an alternative position offered under FECA constitutes "suitable work." 5 U.S.C. § 8106(c). The Department, acting pursuant to that authority, reviewed the alternative position proposed by the Postal Service and concluded it was within Meester's abilities. Meester is essentially asking us to hold that the Department of Labor was wrong in directing her to accept this position. Such a holding would contravene FECA's prohibition against judicial review of compensation decisions. See 5 U.S.C. § 8128; Brumley v. United States Dep't of Labor, 28 F.3d 746, 747 (8th Cir. 1994) (holding that Congress intended to bar judicial review of FECA

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The dissent either misconstrues or misunderstands the limited breadth and depth of both the district court's opinion and today's holding. Therefore, it is virtually impossible to respond concisely and with precision. Lacking the common ground necessary to formulate a focused discussion, we do not attempt a reply.

decisions altogether). We will not allow Meester to use the Rehabilitation Act to circumvent Congress's intent. If Meester's current position is not "suitable work," her remedy is in an appeal of the Department's decision under the statute. See 5 U.S.C. § 8124.

Thus, we hold that a frustrated FECA claimant cannot secure judicial review of a FECA compensation decision by claiming that the Rehabilitation Act entitles her to accommodation in performing an alternative position approved by the Department of Labor when the claim is predicted upon the same illness or injury that gave rise to the Department of Labor's initial decision. Our decision is consistent with the opinions of other courts that have been confronted with this type of claim. See, e.g., Stubler v. Runyon, 892 F.Supp. 228, 229-30 (W.D. Mo. 1994), aff'd, 56 F.3d 69 (8th Cir. 1995) (unpublished table decision); Alexander v. Frank, 777 F. Supp. 516, 523-24 (N.D. Tex. 1991); see also, Reidy v. Runyon, 971 F. Supp. 760, 771 (E.D.N.Y. 1997) (distinguishing Stubler on ground that Reidy's disability discrimination claim was not strictly related to his original injury).

Meester also claims that the district court's grant of judgment as a matter of law to the Postal Service on her retaliation claims was error. We have painstakingly reviewed Meester's arguments, the trial transcripts, and the district court's ruling, and are convinced that the district court did not err.

Finally, Meester alleges numerous errors regarding her disparate treatment claim, from the district court's denial of leave for Meester to amend her complaint to its denial of her post-trial motion for judgment as a matter of law. We have carefully reviewed each of Meester's arguments and find them

to be without merit.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

HEANEY, Circuit Judge, dissenting.

From this day forward, employees receiving FECA benefits for work-related injuries are no longer entitled to full protection under the Rehabilitation Act. I disagree with the majority's conclusion that employers may engage in otherwise prohibited discrimination against employees receiving FECA benefits because nothing in FECA nor the Rehabilitation Act supports the majority's position that FECA's exclusivity provision bars suit under the Rehabilitation Act. Accordingly, I dissent.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination . . . by the United States Postal Service." 29 U.S.C. § 794(a). A "[q]ualified individual with a" disability is one "who, with or without reasonable accommodation, can perform the essential functions of the [employment] position in question." 29 U.S.C. § 1615.203(a)(6).

Prohibited discrimination under the Rehabilitation Act includes an employer's failure to make "reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the

operation of the business." 42 U.S.C. § 12112(5)(A).[4] A "reasonable accommodation" may include-(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . ., and other similar accommodations for individuals with disabilities." Id. § 12111(9)(B).

The Rehabilitation Act prohibits discrimination, which includes an employer's refusal reasonably to accommodate an employee's disability. Rather than barring accommodation claims under the Rehabilitation Act, FECA compensates employees for work-related injuries and indemnifies the United States against actions in tort for those injuries. For example, in Callanan v. Runyun, 903 F. Supp. 1285 (D. Minn. 1994), aff'd 75 F.3d 1293 (8th Cir. 1996), a Postal Service employee sued the Postmaster under Title VII for sexual harassment, discrimination, and retaliation. Even though Title VII discrimination claims generally involve distinct factual scenarios than those presented in Rehabilitation Act claims, the conclusion that FECA does not preclude recovery under Title VII specifically, and the anti-discrimination statutes generally, is equally applicable to the Rehabilitation Act. In Callanan, the district court held that the receipt of FECA benefits did not bar

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Whether a violation of the Rehabilitation Act has occurred is determined by using the same standards as are applied for an Americans with Disabilities Act (ADA) claim, 42 U.S.C. §§ 12111-12117, 12201-12204, and 12210. See 29 U.S.C. §§ 791(g), 794(d).

recovery for discrimination. Id. at 1296. In reaching its conclusion, the district court cited several federal decisions for support. Id.; see, e.g., Miller v. Bolger, 802 F.2d 660, 663, 664 (3d Cir. 1986) ("FECA was intended only to be a substitute for suits against the United States for tortious injury" and nowhere in legislative history "is there any mention of FECA recovery as precluding actions for discrimination"); Eckley v. Bentsen, 1994 WL 114646 at *7 (D.D.C. 1994) (FECA and Title VII each create "separate remedies for distinct types of injuries"); Nichols v. Frank, 771 F. Supp. 1075, 1079 (D.Or. 1991) (FECA does not bar recovery under Title VII where there is no double recovery); Gergick v. Austin, 764 F. Supp. 580, 581 (W.D. Mo. 1991) (FECA is exclusive remedy for work-related personal injuries and is not a bar to recovery for injuries due to discrimination); Johnson v. Sullivan, 764 F. Supp. 1053, 1063 (D. Md. 1991) (Title VII and Rehabilitation Act claims are not barred by receipt of FECA benefits); George v. Frank, 761 F. Supp. 256, 269 (S.D.N.Y. 1991) ("FECA coverage, which is most commonly associated with work-related accidents and diseases, clearly fails to preclude [plaintiff's] request to pursue her discrimination claim under the umbrella of equitable remedies available under Title VII") (emphasis in original); Sullivan v. United States, 428 F. Supp. 79, 81 (E.D. Wis. 1977) (Compensable injuries covered by FECA includes injury by accident and disease, not claims for discrimination or mental distress); see also Nichols v. Frank, 42 F.3d 503, 515 (9th Cir. 1994) ("FECA's exclusivity provisions apply only to additional payments for work-related injuries"); Reidy v. Runyon, 971 F. Supp. 760, 769-71 (E.D.N.Y. 1997) (receipt of FECA benefits does not preclude recovery under the Rehabilitation Act because statutes not mutually exclusive); Taylor v. Secretary of

Navy, 852 F. Supp. 343, 351-53 (E.D. Pa. 1994) (FECA benefits do not preclude recovery under Rehabilitation Act), aff'd Taylor v. Dalton, 61 F.3d 896 (3d Cir. 1995) (unpublished table decision).

The majority fails to account for the fact that FECA and the Rehabilitation Act provide significantly different remedies. Instead, it clings to a mechanical application of FECA's exclusivity provision and erroneously concludes that it bars suit under the Rehabilitation Act. Under FECA, a claimant is entitled to recover lost wages and medical costs incurred as a result of on-the-job injuries. See Miller v. Bolger, 802 F.2d at 662 (citing 5 U.S.C. §§ 8102(a), 8103(a), 8105, 8106). Thus, much like private worker's compensation statutes, FECA was designed to compensate employees for work-related injuries and to indemnify their employers against actions in tort for those injuries. The Rehabilitation Act, however, concerns itself with employment discrimination and provides a claimant with back pay, front pay, attorney's fees, injunctive relief, compensatory damages, and reinstatement.[5] See 42 U.S.C. §§

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The Miller court was confronted with the argument that the receipt of FECA benefits precluded relief under Title VII. See Miller, 802 F.2d at 663. The Miller court was persuaded by the significantly different remedies provided by FECA and the Rehabilitation Act. It reasoned that if FECA were the exclusive remedy for an employer's discrimination against an employee who received FECA benefits, plaintiffs could not be made whole. Id. at 665-66. Even though the Miller court recognized that FECA and an employment anti-discrimination statute like Title VII have the possibility of "overlapping" because both statutes apply in the employment

2000e-16(a)-(e); 2000e-5(f)-5(k); and 1981a(a)(1)-(a)(d). It is evident from the different remedial schemes that FECA is ill-equipped to make whole employees who suffer discrimination.

In addition to the difference in remedial schemes, the conclusion that FECA, rather than acting as a bar to recovery under the Rehabilitation Act, simply compensates employees for work-related injuries and indemnifies the United States against actions in tort is further bolstered by FECA's legislative history.

> Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause

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context, it noted that there was no fear of double recovery. Id. at 666 n.5 (citing 5 U.S.C. §§ 8183, 8132; 42 U.S.C. § 2000e-5(g)). Similarly, there is no fear of double recovery in this case. Even if there were, the district court is fully capable of fashioning appropriate relief.

> federal employees to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employment.
>
> This situation has been of considerable concern to all Government Agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries and the Government.
>
> The saving to the Government by the elimination of costly and needless claims and litigation under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, and the like, which presently weigh heavily upon the Government and involve considerable expense to defend will be eliminated, offsetting in substantial part the increased cost in compensation benefits.

S. Rep. No. 81-836, 81st Cong., 1st Sess., reprinted in 1949 U.S.C.C.A.N. 2136, 2143 (emphasis added).

The legislative history indicates that FECA was intended to compensate employees who suffer work-related injuries and immunize employers from actions in tort for those same injuries similar to private workers' compensation statutes. A private employer's compliance with its workers' compensation obligations does not immunize it from Rehabilitation Act liability. Similarly, FECA's exclusivity

provision must be read as foreclosing an employee who elects to receive FECA benefits from also bringing an action against her employer under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, etc. Congress has not amended FECA to state otherwise, nor has it limited Rehabilitation Act claims in the manner suggested by the majority.

According to the majority, if Meester seeks reasonable accommodations for her modified-duty position, her sole recourse it to apply to the Department of Labor (Department) for a re-evaluation of her FECA benefits. I disagree. While it is possible that Meester could pursue a modification to her duties under FECA, that option is singularly unattractive.[6] If Meester applied to the Department for a modification to her duties, I envision at least two scenarios. First, the Department could determine that Meester's current position is consistent with her medical condition. Meester could not appeal this determination. She would then be forced to continue in her present position or the Department could terminate her benefits–leaving her jobless. Second, the Department could determine that Meester is no longer able to work in her present capacity and is entitled to FECA benefits. At that point, the Postal Service could determine that rather than pay these

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Had there been a trial in this case, it may have been that the accommodations Meester requests are unreasonable or constitute an undue burded to the Postal Service. Given the posture of this case, however, the reasonableness of Meester's requested accommodations is irrelevant.

benefits, it would further modify her position. Notably, the Postal Service would have sole discretion in determining the modifications it would offer. Also, the Department would lack the authority to order the Postal Service to make any modifications to her duties. Moreover, if the Postal Service determined that no further modifications could be made, neither the Department nor the courts could review that determination. Because nothing in either statute suggests that the receipt of FECA benefits exempts covered employers from compliance with the Rehabilitation Act, I cannot agree with the majority that this would have been Meester's only recourse.[7]

Having concluded that FECA's exclusivity provision does not bar suit under the Rehabilitation Act, I believe that Rehabilitation Act analysis requires the use of Meester's post-injury position as her "position in question." Meester claims that she has suffered emotional injuries and that her condition has deteriorated as a result of the Postal Service's failure to provide her with proper rest breaks and two consecutive days off. Meester also claims that she has had to take vacation and sick leave to allow her time to recuperate from the fatigue

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I am not persuaded that only accommodation claims, as opposed to other discrimination claims, would be barred by the receipt of FECA benefits. The Rehabilitation Act prohibits discrimination, which it defines, in part, as an employer's refusal to grant a disabled employee reasonable accommodations. Neither FECA nor the Rehabilitation Act suggests that one of the various forms of prohibited discrimination–here, failure to accommodate–can only be redressed under FECA.

associated with her duties and the Postal Service's failure to grant her requested accommodations. I assume, as we must on appeal from an adverse grant of summary judgment, that these claims are true.

FECA defines an injury which, for the purposes of this case, is an "injury by accident." 5 U.S.C. § 8101(5). While FECA does not define disability, it expressly anticipates that injured employees will suffer a disability. For example, 5 U.S.C. § 8103(a) provides that the United States shall furnish to the employee "the services, appliances, and supplies . . . which the Secretary of Labor considers likely to . . . reduce the degree or the period of disability." Id. (emphasis added). Title 5 U.S.C. § 8106 anticipates the fact that an employee will suffer a permanent partial disability such as that suffered by Meester and provides a compensation schedule accordingly. Id. Finally, the regulations expressly anticipate that a partially disabled employee will return to work and "perform restricted or limited duties." 20 C.F.R. § 10.123(c)(2).

If Meester's pre-injury position were the "position in question" for the purposes of Rehabilitation Act analysis, an employee disabled by a work-related injury could never enjoy Rehabilitation Act protection if she continued to work for the same employer.[8] FECA, not the Rehabilitation Act, obligates

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[8] In holding the FECA barred Meester's recovery under the Rehabilitation Act, the magistrate principally relied on Stubler v. Runyon, 892 F. Supp. 228 (W.C. Mo. 1994, aff'd, 56 F.3d 69 (8th Cir. 1995) (unpublished table decision). In Stubler, the district court granted the Postmaster's motion for summary judgment as a matter of law after a jury had returned its verdict in favor of the plaintiff. Stubler, 892 F.

an employer to create a modified-duty position for an injured employee where appropriate. Certainly, once the Postal Service modified Meester's position, it was not then free to discriminate against her. In this regard, the Postal Service's argument is similar to that made by the Navy in Taylor v. Garrett, III, 820 F. Supp. 933, 936 (E.D. Pa. 1993).

In Taylor, a naval employee was injured and no longer able to perform his pre-injury duties. Id. The employee, after being fired, brought a claim under the Rehabilitation Act. Id. In response to the Navy's argument that the relevant "position in question" was the pre-injury position, the court stated:

> If one were to accept the Navy's rigid definition of the "position in question," an employer who chose to reassign to light-duty work an employee who had become unable to perform his original job would have an unsettling "carte blanche" power over that employee. During the course of the handicapped worker's light-duty employment, the employer would be able, without any sanction under the Rehabilitation Act, to harass that worker because of his handicap, fail reasonably to accommodate that worker's disability, or otherwise

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Supp. at 229. After hearing all of the evidence, the district court held that the plaintiff's Rehabilitation Act claim was barred by the receipt of FECA benefits. Id. Even if Stubler were controlling in this circuit, it is not applicable to the instant case. In fact, the district court in Stubler anticipated the present case by including the following language: "This is not to say, however, that an employee injured on duty never can be 'handicapped' as a consequence of the injury." Id. at 229.

> engage in handicap-based discrimination simply because the employee was not "qualified" for a position that had nothing to do with his current work.

Id. at 939. Similarly, I fear that the majority's opinion enables employers to harass disabled employees, fails to reasonably accommodate them, or engage in otherwise discriminatory behavior simply because they receive FECA benefits.

The majority misinterprets Meester's alleged injury. Meester contends that the Postal Service failed reasonably to accommodate her disability. Simply because her claim is supported by the allegation that her medical condition is deteriorating and that she is suffering from emotional distress because the Postal Service failed to accommodate her, does not convert her claim into an "injury" under FECA. The statutes are not exclusive, and while there may be some overlap in Meester's ability to receive an accommodation, it is not enough to say that the Postal Service complied with its FECA obligations and can now feel free to discriminate against Meester. Quite simply, the Postal Service's compliance with FECA in creating a limited-duty position for an employee who suffered work-related injuries has no bearing on the question of whether the Postal Service must reasonably accommodate the disability of an employee.

Today, the majority eviscerates the Rehabilitation Act by denying its protection to disabled employees–clearly the intended beneficiaries of the act. In attempting to clarify the boundaries of two statutes dealing with reasonable accommodation, the majority exalts FECA, clearly a tort surrogate, to supplant the broad remedial purposes of the Rehabilitation Act. The mischief done today can only be

undone by Congress, our court en banc, or the United States Supreme Court. For the reasons discussed above, I dissent.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHT CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. A3-94-44
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

The plaintiff in this matter has moved this court to enter judgment as a matter of law overturning the jury's verdict. (doc. # 152). In the alternative, the plaintiff has requested the court to vacate the jury's verdict and order a new trial. Id.

After reviewing the plaintiff's submissions and the court's own trial notes, the court finds that there was adequate evidence presented at trial to support the jury's conclusion.[1]

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[1] The court also does not accept Meester's characterization of both Bolme's and Joan Marshall's testimony as the only interpretation of what was actually stated by these witnesses at trial. However, because the court

For example, one of the United States Postal Service's stated explanations for not allowing Marjorie Meester to have a full-time regular position with two consecutive days off was based on business reasons. Specifically, Richard Bolme repeatedly testified that Marjorie Meester was not given Saturdays off because he could best use Meester's capabilities on Saturdays. This explanation alone provides the USPS with a nondiscriminatory reason for its actions. Meester disputed Bolme's explanation, but the jury found in favor of the USPS. When considering a motion for ordering judgment as a matter of law, the court must "assume that all conflicts in the evidence were resolved in favor of the prevailing party. . . ." Toombs v. Bell, 915 F.2d 345, 348-49 (8th Cir. 1990). Although the USPS has proffered other persuasive arguments in support of the jury's verdict, the court considers Bolme's testimony sufficient to support the jury's verdict. Therefore, the court will not discuss each of the USPS's arguments in favor of the jury's verdict. Accordingly, the court rules that Meester's motion for judgment as a matter of law must fail.

With regard to Meester's motion for a new trial, the court similarly finds that Meester's motion must fail. When considering whether to grant a motion for a new trial, the court must determine whether "a miscarriage of justice has occurred." King v. Davis, 980 F.2d 1236, 1237 (8th Cir. 1992). For the reasons stated in the preceding paragraph, the court finds that the jury's conclusions were based on sound and reasonable

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finds adequate reasons for denying Meester's motion, the court will not restate the USPS's interpretation of trial testimony, which the court considers, at least, equally persuasive as Meester's interpretation.

interpretations of the evidence. Accordingly, the court finds that a miscarriage of justice has not occurred and, therefore, denies Meester's motion.

IT IS ORDERED:

1. Plaintiff's motion for judgment as a matter of law (doc. #152) is denied.
2. Plaintiff's motion for a new trial (doc #152) is denied.

Dated: December 31, 1996

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

UNITED STATES DISTRICT COURT

District of North Dakota - Southeastern Division

Marjorie A. Meester

v.

JUDGMENT IN A CIVIL CASE

Postal Service, U.S., Marvin T. Runyon, Postmaster General

Case Number: A3-94-44

x **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

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IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendant for dismissal of plaintiff's complaint and cause of action.

October 7, 1996
Date

Edward J. Klecker
Clerk

/s/ Sheila M. Beauchene
By Deputy Clerk,
Sheila M. Beauchene

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	Civil No. A3-93-80
v.	)	
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Marjorie Meester is a clerk with the United States Postal Service and is assigned to the Prairiewood Station in Fargo, North Dakota. During the years 1988-90, Meester was diagnosed with both tendinitis and carpal tunnel syndrome. Meester filed claims for worker's compensation benefits under the Federal Employees Compensation Act (FECA) for both afflictions. The Secretary of Labor granted both of Meester's claims.

In 1994, Meester brought this civil action pursuant to the Rehabilitation Act, 29 U.S.C. §§ 791 794(a) (1988). Meester alleges that the United States Postal Service's (USPS) failure to adjust her work schedule to allow her two consecutive "days off," in order to accommodate her work-related injury,

constitutes handicap discrimination. Meester also alleges that because of her work-related injury, the USPS has harassed and retaliated against her with respect to her efforts to obtain worker's compensation benefits from the Department of Labor. Meester seeks injunctive relief, compensatory relief, and back pay. The USPS denies all of Meester's contentions. The USPS claims that it has "reasonably accommodated" Meester's handicap and is therefore in full compliance with the requirements of the Rehabilitation Act.

Currently before the court is the USPS's motion for summary judgment.[1] The USPS makes two arguments supporting is summary judgment motion: 1) that as a matter of law, the USPS has made "good faith" efforts to reasonably accommodate Meester's disability; and 2) that Meester's previous recovery of FECA benefits precludes her present claim under the Rehabilitation Act.[2] For the reasons set forth in this

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1 The USPS phrased its motion in the alternative–either for dismissal for failure to state a claim or, alternatively, for summary judgment. This court will consider the present motion as a motion for summary judgment since both parties submitted evidence which was outside the pleadings. See George v. City of St. Louis, 26 F.3d 55, 57 (8th Cir. 1994).

2 In a footnote, the USPS also claims the defense of having made an offer for "full relief." If a claimant rejects an offer of "full relief" during an administrative proceedings, then that claimant cannot bring a lawsuit in federal court. Frye v. Aspin, 997 F.2d 426, 428 (8th Cir. 1993). However, "in a handicap discrimination case . . ., [the offer] must include a 'reasonable accommodation' for the complainant's

memorandum, the court denies the USPS's motion.

SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A dispute is genuine when 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" Westchem Agr. Chemicals, Inc. v. Ford Motor Co., 990 F.2d 426, 429 (8th Cir. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment . . . against a party failing to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex, 477 U.S. at 322. The court considering a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party who enjoys "the benefit of all reasonable inferences to be drawn from the facts." Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337, 1339 (8th Cir. 1989) (citation omitted). Summary judgment is improper if the court finds a genuine issue of material fact; however, "the mere existence of some alleged factual dispute between the parties

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handicap." See Gardner v. Morris, 752 F.2d at 1280; 29 C.F.R. § 1613.704. Because a reasonable jury could find that Meester's requested accommodation was "reasonable" and yet was not offered by the USPS, this court concludes that the USPS cannot show, as a matter of law, that Meester rejected an offer of "full relief."

will not defeat an otherwise properly supported motion for summary judgment . . ." Commercial Union Ins. Co. v. Schmidt, 967 F.2d 270, 271-72 (8th Cir. 1992) (citation omitted). The issue is whether the evidence submitted presents a sufficient disagreement about the material facts so that submission to a jury is required, or whether the evidence is so one-sided that a party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"GOOD FAITH" EFFORTS TO REASONABLY ACCOMMODATE

The USPS claims that it has made "good faith" efforts to accommodate Meester's physical condition. Consequently, the USPS argues, pursuant to the Rehabilitation Act, Meester should not be allowed a jury trial or to recover compensatory damages.[3]

3

The Rehabilitation Act of 1973 prohibits discrimination on the basis of a "handicap" by federal employers such as the USPS. 29 U.S.C.A. § 794 (1994). Moreover, under the Rehabilitation Act, federal employers have a duty to take affirmative steps to provide "reasonable accommodations" so that a handicapped individual has equal access to employment opportunities in the federal government. 29 U.S.C.A. § 791 (1994). However, if an employer has failed to provide a reasonable accommodation, the employer can still avoid compensatory damages and a jury trial by showing that it has made a "good faith" effort to accommodate the handicap. 42 U.S.C.A. § 1981(a)(2) & (3) (1994). However, a "good faith" effort to accommodate would not bar the type of injunctive relief that Meester is

The USPS asserts that, notwithstanding its refusal to grant Meester two consecutive days off,[4] it has already gone to significant lengths to accommodate Meester's handicap. This court does note that the USPS has made several attempts to provide a job description that would satisfy Meester. However, there is also evidence that arguably suggests that some of the USPS's efforts to redefine Meester's job description may have been aimed at harassing Meester rather than accommodating her handicap. For example, Meester's treating physician, Dr. Gregory G. Orson, stated that postal officials, when designing Meester's job description, did not follow his "instructions or recommendations pertaining to Mrs. Meester's ability to perform certain tasks." Affidavit of Gregory G. Orson, at Doc. #23. In fact, Dr. Orson states:

> On a number of occasions, even after I had given my objections to certain tasks being ask (sic) to perform by Mrs. Meester, the Postal Service would issue a substantially similar job offer knowing that she was unable to perform those tasks.

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currently seeking. Id. Specifically, Meester seeks, as a "reasonable accommodation," the alteration of her current work schedule to allow her two consecutive "days off," specifically Saturdays and Sundays.

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A modified work schedule is one of many types of accommodations that the Rehabilitation Act recognizes as a "reasonable accommodation." 42 U.S.C.A. § 12111 (9) (B) (1994). Therefore, the type of accommodation that Meester seeks is allowable under the Act.

Id. Dr. Orson's statements and the testimony of the plaintiff create an issue of fact as to whether the USPS made a "good faith" effort to redefine Meester's job description in a way that would accommodate her handicap.[5]

Furthermore, this court finds that the USPS's refusal of Meester's requested accommodation, to not work on Saturdays and Sundays, could also lead to a conclusion that the USPS has not acted in "good faith." In Howell v. Michelin Tire Corp., the court ruled that an employer's failure to provide a reasonable accommodation to a handicapped employee is probative of a lack of "good faith" on the part of the employer. Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1493 (M.D. Ala 1994).

Meester's physician, Dr. Orson, stated on two occasions that she would do "much better" with two consecutive days off. Because the post office is closed on Sundays, two consecutive days off would essentially mean Saturdays and Sundays. Dr. Orson's statement could arguably be interpreted either that Meester does need two consecutive days off, or that she does not really need such an accommodation but it would be better for her to have it. In light of the ambiguous nature of Dr. Orson's statement, the USPS's refusal to grant her requested accommodation of Saturday and Sundays off seems understandable to the court. However, the reasonableness of the USPS's reaction to Dr. Orson's comment is a question of

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5 Meester at this time seems to agree that she is able to perform the tasks now assigned to her, although she complains about the reluctance of the USPS to reach the present level of accommodation. Her present request for further accommodation involves only consecutive days off.

fact relevant not only to whether it has reasonably accommodated Meester's handicap, but also whether it has exercised good faith in attempting to do so.

The USPS explains further that it has not granted Meester's request for two consecutive "days off" because doing so would create an "undue burden" on the operations at Prairiewood. In support of its position, the USPS cites section 12111(9) of the Rehabilitation Act which states that employers are not required to provide accommodations that would cause an "undue burden" on the business. 42 U.S.C.A. § 12111(9); 29 C.F.R. § 1630.2(o) (1994).[6] The USPS argues that Saturdays are the busiest day of the week and the post office needs Meester to perform her duties on that day. Also, Richard Bolme, Meester's supervisor, testified in his deposition that "it would impose an undue hardship on the Postal Service to accede to [Meester]'s request." Brief in Support of Defendant's Motion for Summary Judgment at 6, Doc. #17 (citing the deposition of Richard M. Bolme).

Meester counters that the USPS would not experience an "undue burden" if it granted her requested accommodation. In support of her argument, Meester cites the affidavit testimony of Jeremy Cahill, President of the local affiliate of the American Postal Workers Union. Cahill states:

Scheduling Marjorie Meester . . . Monday through

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In determining whether a requested accommodation would create an "undue burden," the Rehabilitation Act directs courts to consider, inter alia, the "impact . . . of such accommodation upon the operation of the facility." 5 U.S.C.A. § 8101 (10)(B)(ii) (1994).

> Friday would not impose an undue burden upon the post office... All part-time employees utilized by the Postal Service could be trained to perform Marjorie Meester's tasks on Saturday and Sundays, if necessary.

Id. Furthermore, according to Cahill, all other full-time regular employees[7] at the postal office where Meester works have both Saturdays and Sundays off. Id. The extent and origin of Cahill's knowledge concerning the feasibility of Meester's requested accommodation are unknown. However, because the USPS has not disputed Cahill's personal knowledge to testify to these facts, this court can only conclude that Cahill's testimony, if believed, could lead to a finding that granting Meester two consecutive "days off" would not have created an "undue burden." In such case, the USPS's failure to provide a "reasonable accommodation" would be probative of the USPS's lack of "good faith" in its attempt to accommodate Meester. See Howell, 860 F. Supp. at 1493. The court, when considering a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party, who enjoys "the benefit of all reasonable inferences to be drawn from the facts." Vacca, 875 F.2d at 1339 (citation omitted). In light of the testimony from Dr. Orson and Jeremy Cahill, this court finds

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7 Meester raises an issue about entitlement to conversion to full-time regular status. The USPS argues that Meester conceded in her deposition testimony that the conversion issue is an administrative matter rather than an issue in this lawsuit. Meester's counsel, however, still argues the issue in his brief as an indication of lack of "good faith."

that whether the USPS has made a "good faith" attempt to reasonably accommodate Meester is a material fact over which reasonable minds could differ. Even though the USPS has come very close to satisfying its burden, the court concludes that on the present record the USPS has not fully shown, as a matter of law, that it has engaged in "good faith efforts to accommodate Meester's disability. Consequently, Meester has a colorable claim for compensatory damages and therefore is entitled to a jury trial.

FECA RECOVERY BARS FURTHER RECOVERY UNDER THE REHABILITATION ACT

The USPS's second argument supporting summary judgment is that Meester's prior recovery of disability benefits under the Federal Employee's Compensation Act (FECA) bars her present claim for redress under the Rehabilitation Act. The FECA states in relevant part:

> the liability of the United States or an instrumentality thereof under this subchapter . . .is exclusive and instead of all other liability of the United States or the instrumentality to the employee . . . because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, . . . or judicial proceeding under a workmen's compensation statute or under a federal tort liability statute.

5 U.S.C. § 8116(c) (1990) (emphasis added). The USPS asserts that the FECA provides the exclusive remedy for on-the-job injuries sustained by federal employees. Accordingly, the

USPS argues Meester's discrimination claim under the Rehabilitation Act should be barred by her prior recovery under the FECA.

This court notes that there is no reported precedent on this precise issue. However, the federal circuits who have considered this issue with respect to other antidiscrimination statutes have ruled that recovery under the FECA does not bar a subsequent discrimination claim. In Miller v. Bolger, the Third Circuit ruled that the FECA does not bar recovery under Title VII despite the fact that the claimant has already received benefits under the FECA for some of those injuries. Miller v. Bolger, 802 F.2d 660, 662 (3d Cir. 1986); See also Sullivan v. United States, 428 F. Supp. 79 (E.D. Wisc. 1977) (ruling that a discrimination claim is not barred by a previous FECA recovery). The Miller court reasoned that Congress intended the FECA to be "a substitute" for only those claims brought pursuant to federal tort statutes such as the Federal Torts Claims Act, the Admiralty Act, and the Public Vessels Act. Miller, 802 F.2d at 663. However, the Third Circuit further opined that the FECA was not intended to "exclude liability under a federal discrimination statute . . ." Id. at 662.

Similarly, in DeFord v. Secretary of Labor, the Sixth Circuit ruled that the FECA does not bar a discrimination claim brought pursuant to the Energy Reorganization Act. DeFord v. Secretary of Labor, 700 F.2d 281, 289-90 (6th Cir. 1983). The Sixth Circuit reasoned that Congress's grant of rights under the FECA to all federal employees "should not prevent enforcement of a provision quite specifically intended to remedy unlawful discrimination." Id. at 290.

Furthermore, this court finds persuasive the fact that the Rehabilitation Act itself does not mention the exclusivity

provisions contained in FECA.[8] In Miller, the Third Circuit similarly found persuasive the fact that Title VII did not specifically refer to FECA's exclusivity provisions. Miller, 802 F.2d at 662 (stating that nothing in the legislative history of either Title VII or the FECA suggests that the exclusivity clause of the FECA applies to "suits for relief for discrimination"). This court agrees with the Miller court's rationale and concludes that Congress did not intend recovery under the FECA to bar subsequent discrimination claims brought pursuant to the Rehabilitation Act.

Based on the lack of Congressional intent for FECA claims to bar subsequent discrimination claims and the persuasive federal precedent on this issue, this court rules that Meester's present claim, brought under the Rehabilitation Act, is not barred by her previous recovery under the FECA. However, the court will not allow any double recovery in the event some of the relief available under the FECA and the Rehabilitation Act were to overlap. The court notes that both FECA and the Rehabilitation Act guard against double

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In contrast, when Congress enacted the Swine Flu Act, which authorized claims against the federal government "for injuries resulting from the vaccination program," Congress specifically stated that recovery under the Swine Flue Act was precluded if a claimant had already been compensated pursuant to another "method of compensation . . . " Miller v. Bolger, 802 F.2d 660, 664 n.2 (3d Cir. 1986) (citing the National Swine Flue Immunization Program of 1976, § 2(k)(5)(C), 90 Stat. 1113, 1116-17 (1976) (repealed 1978)).

recovery. See 5 U.S.C.A. §§ 8131-32 (1988); 29 U.S.C.A. § 794a(a)(1) (1988); 42 U.S.C.A. § 2000e-5(g) (1988).

IT IS SO ORDERED:

Defendant's motion for summary judgment (doc #24) is denied.

Dated: September 18, 1995

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. A3-93-80
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Trial of this case is scheduled to begin on May 20. Plaintiff has moved to amend the complaint to clarify the nature of her claims. The court grants the motion to amend, but the amendment has raised certain issues the court must resolve prior to trial.

REASONABLE ACCOMMODATION ISSUE

The parties have recently focused on the issue of the "position in question." In order to pursue her claim under the Rehabilitation Act, plaintiff must be an "otherwise qualified individual with a disability." 29 U.S.C. § 794. Defendant claims the relevant position for determining whether plaintiff is

a qualified individual is her original job, that of a postal distribution clerk. Plaintiff contends the position consists of the limited duties she now performs.

The court's reflection on this issue and the recent refinement of the nature of the plaintiff's claims necessarily leads the court to revisit an argument previously raised by defendant, which the court only briefly addressed and rebuffed: whether plaintiff's administrative claim under the Federal Employees' Compensation Act (FECA) bars subsequent Rehabilitation Act claims.

Defendant initially filed a motion for summary judgment directed only at whether the U.S. Postal Service (USPS) exercised good faith in attempting to accommodate plaintiff's disability and whether a FECA claim precluded any subsequent claim brought pursuant to the Rehabilitation Act. The court ruled that it could not determine the "good faith" issue as a matter of law on the record then presented and that FECA did not act as an absolute bar to Rehabilitation Act claims.[1] The court did not separately address the impact of a FECA remedy on just plaintiff's accommodation claims.

The defendant then conducted further discovery and moved for reconsideration on the issue of "good faith" but did not reargue FECA preclusion. During this stage of this case, defendant raised as a peripheral issue whether plaintiff was a "qualified individual with a disability," arguing that she is unable to perform the essential functions of a postal distribution

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[1] The court later noted upon reconsideration of the "good faith" attempt to accommodate issue that plaintiff was also raising disparate treatment and retaliation claims.

clerk and therefore has no Rehabilitation Act claim. Since this argument was not made in the original summary judgment motion and was not argued as a principal issue in the reconsideration motion, the court did not address the issue at that time.

Now the court concludes that defendant's position on FECA and on "qualified individual" is correct as applied to plaintiff's accommodation claims. Plaintiff suffers from a work-related injury. It is clear and undisputed that she can no longer perform the essential functions of a postal distribution clerk position, even with reasonable accommodation. Because her injury was work-related, she pursued a claim and enjoyed certain rights under FECA. If she was not to be placed on total disability retirement status, the USPS as her employer was required to modify her duties to meet the limitations of her injury. As a result, in proceedings before the Department of Labor's Office of Workers' Compensation Programs under FECA, plaintiff's present set of duties, consisting of telephone customer service and checking in carriers, was created to meet her work-related injury medical restrictions. She has been performing those duties since 1991, and it appears she may be permanently limited to those duties.

Plaintiff's present limited duties do not constitute a regular USPS position. Her "position" exists solely as a FECA accommodation. If her condition were to improve to the point that she could return to her original job, her present "job" would be eliminated. Likewise, if she were to leave the USPS, the "job" would be eliminated. In essence, plaintiff is presently receiving workers' compensation benefits under FECA in the form of a special job. Any further accommodations she claims to need as a result of her work-related injury was or is a claim

available to her under FECA. She is presently performing a job approved for her by the Department of Labor. Determinations by the Department of Labor regarding job duty limitations and work conditions under FECA are not subject to judicial review. 5 U.S.C. § 8128(b)(1) and (2).

Plaintiff cannot take her present FECA-created duties and bootstrap them into the "position in question" for determining whether she is qualified to perform the essential functions of the position for purposes of a Rehabilitation Act failure to reasonably accommodate claim. Her remedy for accommodating her disability continues to be under FECA. It may not be the remedy she prefers, but it is the sole remedy available to federal employees seeking accommodation for their work-related injuries. See Stubler v. Runyon, 892 F.2d 228 (W.D. Mo. 1994). If plaintiff did have a Rehabilitation Act claim of lack of reasonable accommodation her "qualified" status would have to be based on her original position of distribution clerk. She cannot perform the essential functions of that job, even with reasonable accommodations, so her claim would necessarily fail.

The court concludes that its earlier rulings on defendant's motion for summary judgment must be vacated and plaintiff's accommodation claims, even as now alleged in Court II of the amended complaint, must be dismissed.

DISPARATE TREATMENT ISSUE

Notwithstanding the court's ruling on what should be considered the "job in question" as the starting point to determine whether defendant has "reasonably accommodated" plaintiff, the court finds that, for purposes of plaintiff's

disparate treatment claim, the "job in question" would not be plaintiff's original "distribution clerk" position.

The court is persuaded by the reasoning in Dancy v. Kline, 638 F. Supp. 1076 (N.D. Ill. 1986), which the USPS has cited in its brief. In Dancy, the federal district court considered issues not unlike the issues present in this case and ruled that "the position in question" refers to the position which is the subject of the lawsuit. Id. at 1078. The court illustrated that:

> If the case involves a denial of promotion, the 'position in question' would be the position to which the plaintiff seeks to be promoted. If the case involves a refusal to hire, the 'position in question' would be the position to which the plaintiff has applied.

Id. Plaintiff must still establish that she can perform the "essential functions" of the "job in question" before attempting to prove her disparate treatment claim. However, in the present case, the job that is the subject of plaintiff's disparate treatment claim is the "full-time regular" position (with split days off), which defendant offered plaintiff.

RETALIATION CLAIM

Because plaintiff's retaliation claims are not dependent on a determination of what should be considered the "job in question," the court makes no ruling as to what should be considered the "job in question" for purposes of plaintiff's retaliation claims. See Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980) (stating that for purposes of a retaliation claim, a plaintiff need not actually establish that the original

complaint of discrimination, which triggered the alleged retaliation, was meritorious); Jennings v. Tinley Park Comm. Consol. Sch. Dist. No. 146, 864 F.2d 1368 (7th Cir. 1988).

IT IS ORDERED:

1. Plaintiff's motion to amend her complaint is granted.
2. Plaintiff's "reasonable accommodation" claims, as stated in Count II of the amended complaint, are dismissed with prejudice.

Dated: May 17, 1996

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. A3-93-80
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This order amends the court's previous orders dated December 20, 1993 (doc. # 70) and May 17, 1996 (doc. #99). Based on the stipulation of the parties and the court's own determination, the court finds that the issues resolved in the two orders are controlling questions of law to which there are substantial grounds for a difference of opinion. The court further finds that an immediate appeal from the two orders may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Although the court grants the relief sought in the parties' stipulation, the court does not necessarily endorse the parties' characterizations in the stipulation regarding the nature and implications of certain of the court's findings.

The court has made the further determination that a stay of the proceedings before this court is appropriate pending the Eighth Circuit Court of Appeals' decision on the application for appeal.

IT IS SO ORDERED.

Dated: May 17, 1996

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-8075NDF

Marjorie Meester, *
*
Petitioner, *
*
vs. *
*
Marvin T. Runyon, *
Postmaster General, *
United States Postal Service, *
*
Respondent. *

Petitions for
Permission to Appeal

No. 96-8076NDF

Marjorie Meester, *
*
Respondent, *
*
vs. *
*
Marvin T. Runyon, *
Postmaster General, *
United States Postal Service *
*
Petitioner *

JUDGMENT

Cross-petitions for permission to bring an interlocutory appeal have been considered by the court and are denied.

June 10, 1996

A true copy

ATTEST:

/s/ Michael E. Gans
Clerk, U. S. Court of Appeals
Eighth Circuit

5 U.S.C. § 8101(5)

"'Injury' includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services;"

29 U.S.C. § 791(b)

"**Federal agencies; affirmative action program plans.** Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, with one hundred and eighty days after the date of enactment of this Act [enacted September 26, 1973], submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."

29 U.S.C. § 794a(a)(1)

"The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of section 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 501 of this Act [29 U.S.C. § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy."

42 U.S.C. § 1981a(a)(2)

"Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and the regulations implementing section 501 [29 U.S.C. § 791], or who violated the requirements of section 501 of the Act [29 U.S.C. § 791] or the regulations implementing section 501 [29 U.S.C. § 791] concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C. § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent."

42 U.S.C. § 1981a(a)(3)

"Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. § 12112(b)(5)] or regulations implementing section 501 of the Rehabilitation Act of 1973 [29 U.S.C. § 791], damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."

42 U.S.C. § 1981a(b)(1)

"Determination of punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

42 U.S.C. § 2000e-16(a)

"**Discrimination prohibited.** All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, United States Code, in executive agencies as defined in section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Fed. R. Civ. P. 15(a)

"**Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders."

Fed. R. Civ. P. 56(c)

"**Motion and Proceedings Thereon.** The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

29 C.F.R. § 1614.203(b)

"The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps."

29 C.F.R. § 1614.203(c)(1)

"An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program."